THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: A09 / 2024

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

04 June 2024
DATE

SIGNATURE

In the matter between:

LEBOHANG SHANGE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 04 June 2024.

Introduction.

[1] The weekend of 13 to 15 September 2019 was an eventful one for LS and his girlfriend TC. It started off with them showing not just love and affection for each other, but also support for their families. Like any other couple that lives apart from each other, they were obviously longing to be with each other. That weekend had its own challenges though. Before they could enjoy the privacy that lovers always need, they first had to travel from Gauteng, the province each one of them called home, to Newcastle in Kwazulu-Natal where the extended family of LS resided. TC would be by her lover’s side to support him during his family ceremony.

[2] When TC learned that there was no room for her to sleep in the family home they were visiting that Friday night, she understood the cultural limitation placed on her as a woman not yet married to their son. The family house only had a space for her boyfriend to sleep. That night she slept in his car. The next day, LS managed to arrange with an elderly woman from the neighbourhood for TC to sleep while the ceremony was underway. The weekend did not end as great as it started because as they were driving back, they were involved in a motor vehicle accident around the area of Embalenhle, Mpumalanga. Their motor vehicle hit the cows on the road. In the car, they were with about three relatives and a friend of LS, with whom they had gone to Newcastle. LS was going to drop off one of the occupants of the motor vehicle, his cousin, who resided in Embalenhle. His motor

vehicle was damaged beyond repair. Luckily, none of the occupants was injured.

[3] The police were willing to help them complete their journey at least to Embalenhle. Prior to the accident, LS had planned to proceed further with the journey with his lover and the remaining occupants after dropping off his cousin. Sadly, by the time they departed from Embalenhle, LS and TC did not leave together. They were no longer a couple in love, for they had split. TC had visible swelling and bruises on her face inflicted by LS. This whole drama replayed itself before the Evander Regional Court (court *a quo*) when the two lovers relayed in a trial as to how their love affair came to an abrupt end on 15 September 2019. TC was the complainant and LS was the accused in that trial.

[4] During the trial, it was common cause that TC's injuries were inflicted at the hands of LS. The dispute was rather whether this happened when he acted in self-defence against TC's attack or he was the one who attacked her. Interestingly, a charge of assault with the intent to do grievous bodily harm was not the only charge preferred against LS. It turned out that despite the presence of so many companions at any given moment that weekend, LS and TC still managed to have sexual intercourse. This resulted in LS facing a charge of rape, in contravention of section 3 of Act 32 of 2007.

[5] The dispute in respect of this charge was whether the sexual encounter was consensual. LS alleged that it was consensual and that it happened in Newcastle before their brawl that saw them split on the following day. TC averred that the sexual encounter took place against her will, in Embalenhle, on 15 September 2019 and this was after she was assaulted by LS.

[6] It goes without saying that the court *a quo* rejected the version of LS and accepted the one presented by TC, hence this appeal. On 15 March 2023, it convicted him on both charges. He was sentenced on 13 April 2023 to 10 years' imprisonment for contravening section 3 of Act 32 of 2007 and 06 (six) months imprisonment on a charge of assault with intent to do grievous bodily harm. The court ordered the sentence on the second charge to run concurrently with the 10 years' imprisonment that was imposed on the first count. The appeal on both the convictions and the sentences is with leave of this court through a petition, after leave to appeal was refused by the court *a quo*. LS is the Appellant in this appeal.

Grounds of appeal.

[7] *Ad conviction:* It was submitted for the Appellant that the court *a quo* erred in not properly taking into account the peculiar circumstances and background of this matter on a conspectus of which the Magistrate should have found:

a. that reasonable doubt exists, specifically relating to the credibility of the single witness, the complainant;
b. on the basis of which the Appellant should have received the benefit of the doubt and should have been acquitted specifically on count 1, being the charge of rape; and
c. also on count 2, being the charge of assault with the intent to do grievous bodily harm on the basis that his version that he at all times acted in self-defence relating to an ongoing attack on him by the complainant, cannot be rejected as false beyond a reasonable doubt.

[8] *Ad sentence*: It was submitted that should the conviction on rape be upheld, this court should set aside the sentence imposed by the court *a quo*. It was argued that,

a. the learned Magistrate correctly found that the minimum sentence regime at the time of the commission of the rape was applicable, namely a minimum sentence of 10 years' imprisonment. It is however submitted that in view of the circumstances of this matter as set out above coupled with the personal profile of the appellant, same constitute substantial and compelling circumstances on the basis of which the court had an unfettered discretion to impose a lesser sentence on the appellant than the minimum sentence. It is submitted that a substantive part of the sentence in the circumstances should be suspended.

b. As far as the conviction of assault with the intent to do grievous bodily harm is concerned, it is submitted that should the court find that the appellant on his own version exceeded the bounds of self-defence, that under those circumstances a non-custodial sentence should have been imposed.

Before the court *a quo*.

[9] The background facts reflected under introduction above are mainly common cause. The disputed facts which form the basis of this appeal can be best told in the complainant and the Appellant's own versions. According to the complainant, they reached the Appellant's cousin's place in Mbalenhle in the early hours of the morning on 15 September 2019. After they arrived, the Appellant proceeded to a room normally used by his cousin, which had two single beds, one of which belonged to his cousin's roommate. Although his cousin's roommate left the room upon their arrival, the complainant decided not to join the Appellant in sleeping because it did not feel okay for her to sleep, while the Appellant's friends could not sleep as there was not enough space for them to sleep. So she stayed awake seated in the living room with them.

[10] As the day broke, the Appellant rose up and came to where she was seated with his friends. Around that time, she received a phone call that she answered. When she finished, the Appellant demanded that she should hand over her phone to him, and she refused. He forcefully took it from her and walked to the room where he was sleeping. She followed him struggling to grab the phone back from him. Once in the room, he accused her of dating his friends, referring to the men with whom she was seated out there. She then tried to grab her phone back from him and he hit her with open hands, fists and also kicked her until she started bleeding through her nose. He also grabbed the wig she was wearing, and kept it away from her, and she would not leave the room without it.

[11] There was a noisy commotion in the room which attracted the attention of people in the house as they came to investigate. One of those who came was the Appellant's cousin who was one of the tenants in that house. He cautioned them that they were making noise before leaving and locking the room's door from outside. She and the Appellant continued their argument as soon as the cousin closed the door behind him. As they argued, she told him she was done with him and would no longer want to continue as his girlfriend. He then threw her to the bed where he throttled her. At all these times, she wore a light short skirt which exposed her underwear when she was thrown to the bed. It was at this stage that the Appellant moved her underwear to the side, penetrated her with his penis and started to have sexual intercourse with her while she resisted.

[12] The Appellant made no use of a protective condom when having sexual intercourse with her. He stopped after ejaculating inside her. When he finished, he started crying and apologising, just as he has done so in the past.

He however blamed her for causing him to be in that state because she was busy on her phone. He only allowed her to leave the room when he was finished, but he did not let her take her big bag. A certain lady, a tenant in the same house, unlocked and opened the door from outside and that is how she managed to exit the room. The lady who opened the room could see that she was injured. She is the one who walked with her to the local police station where she laid charges of rape and assault against the Appellant.

[13] The Appellant's version mirrors that of the complainant only in respect of the journey to and from Newcastle, how they were involved in an accident, and how their journey to Embalenhle was completed with the help of the police. That is how far their versions overlap, nothing further. According to him, trouble started that morning in Embalenhle after they had gone to a nearby local pub where they had gone to buy alcohol and food to eat. While there, he asked the complainant to call her uncle to come and collect them in her motor vehicle, as she also owned one. She refused saying, as a man, he should make a plan.

[14] He started making calls to his friends, including a female friend. The complainant overheard the female voice on the phone and started demanding his cell phone while accusing him of cheating. She started to hit him and he also hit her back in self-defence, and that is how she sustained the bruises later observed by the forensic nurse. He denied having had sexual intercourse with her that day saying they were far from a bed when they had an altercation. He did however have sexual intercourse with her on Friday the 13th and Saturday the 14th of September 2019 in Newcastle in his motor vehicle.

[15] This version was put to her, and she denied it saying on 13 September 2019, she slept in the motor vehicle alone and the following day she again slept

alone at a certain neighbouring old lady. The only time she had sexual intercourse with him was in Mbalenhle and this was done against her will and after he assaulted her.

[16] The Appellant attempted to explain the vaginal injuries observed by the forensic nurse who examined the complainant on 16 September 2019, as a result of rough sex which she always likes. The version to the effect that the complainant likes rough sex was however not put to her when she gave evidence.

[17] He admitted that when she left, the complainant left her bag behind and that he refused to let her take it, but that was because he did not want her to go while she knew no one locally. He told her he was organising transport that would take them back to Gauteng. At that stage, he did not know that she had left the premises or that she had gone to the police station.

[18] Upon evaluation of the evidence, the court *a quo* accepted the complainant's version as being in line with the undisputed facts of the case, and it found the case for the State to have been proved beyond a reasonable doubt. The Appellant's version was rejected as being improbable, and he was convicted as charged in respect of all the charges.

Principles applicable on appeal

[19] The submissions made as grounds of appeal are general in nature, challenging the court *a quo*'s conclusions in convicting the Appellant. In essence, the Appellant submits that he was convicted on poor evidence and that he should have been given the benefit of doubt and acquitted. In *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*[1], Petse

[1] (248/2022) [2024] ZASCA 59 (24 April 2024) at para 38.

DP and Mabindla-Boqwana JA, writing the unanimous judgment by the Supreme Court of Appeal (the SCA), reiterated the principle to the effect that the powers of an appeal court to interfere with the trial court's factual findings, are circumscribed. Thus, the appeal court is not at large to interfere unless it is satisfied that the trial court committed material misdirections or a demonstrable blunder in evaluating the evidence. They quoted from the earlier judgment of *R v Apter and Apter*[2] where the Appellate Division said,

> "[W]here the judicial officer in the trial court has taken every point into consideration and has not misdirected himself or been guilty of any error of law, an appeal court, in a case in which the ground of appeal is that the trial court ought to have had a doubt, will not be entitled to interfere with the verdict unless it is satisfied that the trial court ought to have had a doubt; but I am prepared to assume that in this appeal, because of the criticism to which I have referred, we should re-try the case in the sense of inquiring whether on the record of the evidence, taken in conjunction with the impression made on the trial court by the witnesses, we ourselves are satisfied beyond reasonable doubt of the guilt of the appellants."

Discussion

[20] It is apposite for this court to answer if there was a material misdirection by the court *a quo*. This question cannot be answered in vacuum or in general terms. It is the Appellant's duty to be specific in how the trial court erred in its evaluation of evidence, which resulted in a wrong factual finding being challenged now on appeal. It is in the evaluation of evidence that the court of appeal can tell if there was misdirection and if such misdirection is material to justify interference.

[2] See reference made in *R v Dhlumayo* 1948 (2) SA 677 (A) at p. 687.

[21] In paragraphs 7.5 and 10 of the Appellant's heads of argument, the following was submitted,

> "7.5 [T]he submissions made relating to the finding of the Magistrate is that with respect, the magistrate erred in not properly taking into account the peculiar circumstances and the backgrounds of the matter, including the fact that and the Appellant and the complainant was at all relevant times, until the said argument and violent between them broke out, in a personal relationship and did not attach sufficient weight to the enormity of the fact that the complainant lied to and misled the court about consensual intercourse she had with the Appellant the very two days before the alleged rape. Had the magistrate done so, she would have found with respect that:
> 7.5.1 reasonable doubt exists specifically relating to the credibility of the single witness, the complainant Ms. TC, and specifically relating to the alleged act of penetration which on her evidence was part and parcel of the physical confrontation between the parties on which count 2 is based;
> 7.5. 2 reasonable doubt exists on the basis of which the Appellant should have received the benefit of doubt and should have been acquitted on count 1, being the charge of rape; …
>
> 10. While in KZN at the ceremony relating to the Appellant, the complainant had to sleep in the Appellant's car as she was not married to the Appellant and also was wearing pants and therefore not allowed in the homestead. Appellant gave evidence and it was on his behalf put to the complainant that the Appellant and the complainant had sexual intercourse involving penetration in the said vehicle on the 13th as well as the 14th of September 2019. This, very importantly, is denied by the complainant but Appellant is corroborated relating to Appellant's allegation of consensual sex on at least the 14th of September 2019 by the J88 medico legal report admitted as Exhibit A in the matter and which was completed on the basis of information obtained from the complainant herself…"

[22] In response, counsel for the State submitted that,

> "7.6.1 the contents of the J88 particularly paragraph D, was never put to the victim, to explain the note.
> 7.6.2 It is not correct that the victim was only with the [Appellant] from 13-15 September 2019. The victim from the 13th was with several men in the car, until the 15th and they ended up in Embalenhle.
> 7.6.3 If this note was asked to the victim, she could have given an explanation why she mentioned she last had sexual intercourse on 14 September 2019.
> 7.6.4 It is probable that the victim might have had consensual sex with one of the men in the house. It is also probable that the nurse might have made a mistake with that entry, however, that point was never explored with the victim and as a result, the Respondent respectfully submits that such an insinuation should be dismissed."

[23] It is clear from the above, that the main criticism levelled against the court *a quo* by the Appellant is its failure to make a negative finding against the complainant's credibility. A negative finding would have made way for his version to be acceptable as reasonably possibly true. The assertions by the Appellant have their roots in the evidence of the forensic nurse, Ms. Thabile Catherine Malaza (Ms. Malaza), who examined the complainant on 16 September 2019. Under paragraphs 10 and 11 of the medical report (J88), Ms. Malaza noted that the last date of sexual intercourse with consent was 14 September 2019 and that the number of consensual sexual partners the complainant had over the last seven days was one. Ms. Malaza testified that what she wrote in these paragraphs, is what was relayed to her by the complainant.

[24] It was submitted on behalf of the Appellant that the entries in paragraphs 10 and 11 of the J88 are in line with the Appellant's version in that the Appellant testified that that he did not have sexual intercourse with the complainant on 15 September 2019. According to him, he had sexual

intercourse with her on 13 and 14 September 2019. This version was denied by the complainant when it was put to her. The Appellant now argues that the complainant lied in her evidence when she testified that she did not have sexual intercourse with him on those two dates as she confirmed to Ms. Malaza that she did. If the complainant lied on this aspect, so goes the argument, the court *a quo* should have found that she was not a credible witness.

[25] Sadly, this piece of evidence was not raised with the complainant when she gave evidence, for her to clarify what she meant, if she said what is reflected therein. The first possibility is that the complainant may not have said what is attributed to her, meaning, there was a miscommunication as a result of her not hearing the question or Ms. Malaza not understanding what the complainant was referring to in her answer. A simple question to her would have given clarity in this regard.

[26] It looks like the Appellant and/or his counsel did not take note of what was written in the J88 medico legal report until the complainant had finished giving evidence. In fact, it appears from the record that this aspect was only brought to the attention of the counsel by the Appellant when she was wrapping her cross examination of Ms. Malaza. No efforts were made to have the complainant called back to answer this.

[27] The Appellant's argument suggests that there is no other inference to be drawn from the conclusions he wants this court to reach; that the complainant lied to the court. I am of the view that the Appellant's argument would carry weight if there is no other conclusion to reach than that suggested by him. In essence, the Appellant is insinuating that the person the complainant was referring to when she consulted with Ms. Malaza as the one she had consensual sexual intercourse with, was the Appellant. That

would also entail that she had no other sexual partner with whom she engaged sexually over the seven days preceding the consultation. What I find hard to accept is that this is the only inference that can be reasonably drawn from the common cause facts of the case.

[28] A possibility cannot be excluded that the complainant may have engaged in sexual encounter with one of the Appellant's friends with whom they went to Newcastle that weekend. After all, the Appellant was said to be so suspicious of the complainant dating his friend, that he confronted her over it. This resulted in an argument that escalated to a physical brawl between him and her. If she was indeed in a relationship as he accused her, this would then explain why she did not get into a room and sleep with the Appellant while her other partner was in the same house.

[29] If there is any merit in the Appellant's suspicions and accusations in this regard, for the complainant to explain the true position to Ms. Malaza would be wise as the swabs containing possible semen were in any event taken from her vagina. There would be no point in concealing what the forensic laboratory would soon expose.

[30] Furthermore, the complainant was not asked if there was any truth in the accusations that she was dating the Appellant's friend. She merely hinted that the Appellant may have been suspicious because she remained seated with his friends while he went to sleep. Confirming this possibility could have exposed her as being unfaithful towards the Appellant. But one can cheat on his/her lover and remain a credible witness who can even be honest about that promiscuity.

[31] Moreover, sight need not be lost of the fact that the complainant described the Appellant as her boyfriend. We know from *Director of Public*

Prosecutions, Eastern Cape, Makhanda v Coko[3] that being a boyfriend and a girlfriend or lovers does not always translate to sexual partners. People can be in love without sexual intimacy. Whether any relationship extends to sexual intimacy is not a matter of presumption, but should be factually established by means of evidence.

[32] Lastly in this regard is suppose hypothetically speaking, the Appellant's insinuation is the only reasonable inference to draw from the common cause facts of this case, how would this impact on her credibility as a witness? Given the totality of the evidence that was properly evaluated by the court *a quo*, I do not see how this would have materially impacted on the complainant's credibility. Over and above that, I reach a conclusion that it would be irregular, to make credibility findings on a witness, over issues that were not canvassed with him/her.

[33] The court *a quo* was after all alive to all possible inferences that could be drawn from the common cause facts, now that these issues were not put to the complainant. It took into consideration the medical report, the gynaecological injuries noted therein and evidence by a police officer who saw the fresh injuries on the complainant's face, and found that the case for the State was proved beyond a reasonable doubt.

[34] The complainant did not just have injuries on her face and neck, but also had bruises on the 6 o'clock area of her fossa navicularis, which is the inner part of her vagina, which normally relaxes and gets lubricated in consensual sexual intimacy. Ms. Malaza found the injuries to have been consistent with forced vaginal penetration. Ms. Malaza was steadfast in her opinion as a forensic nurse because even if there was consensual sexual encounter

[3] *Supra*. In *Coko*, the SCA reinstated the conviction of the respondent on a charge of rape where it was alleged that he raped his girlfriend with whom he had not had sexual intimacy before.

between the complainant and the Appellant on 14 September 2019, it would not take away that he had forced sexual intercourse with her on 15 September 2019. This would be based on her professional observation and the version relayed to her by the complainant.

[35] In an attempt to explain the injuries on the fossa navicularis, the Appellant testified that the complainant liked "rough sex" which required no foreplay. This version was equally not put to her when she testified and was rightly rejected by the court *a quo*.

[36] I can also find no fault in rejecting the Appellant's version that he inflicted the injuries observed by Ms. Malaza on her face and on her neck, while acting in self-defence. The manner in which the complainant left the house when going to the police station demonstrates that the Appellant was not a victim who was being assaulted by her. She is the one who begged for her bag and he refused with it. I find no misdirection in the court *a quo*'s finding to the effect that the case for the State was proved beyond a reasonable doubt. Appeal on merits is bound to fail.

Ad sentence

[37] There was concession by the Appellant to the effect that the court *a quo* was correct to conclude that the prescribed minimum sentence introduced by the Criminal Law Amendment Act, no. 105 of 1997 was applicable when it comes to the charge of rape he was convicted of. The prescribed minimum sentence applicable on that charge was 10 years' imprisonment while maximum thereof was 15 years' imprisonment. In terms of that Act, the court could only deviate from the prescribed minimum sentence in case there were substantial and compelling circumstances that justify the imposition of a lesser sentence.

[38] In *S v Malgas*[4], the SCA held,

> "[T]he specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders."

[39] The Appellant does not advance any factors that the court *a quo* should have considered as substantial and compelling enough to justify the imposition of a lesser sentence. Instead, he submits that the unique circumstances of a case should have been seen as substantial and compelling reasons that justify such. I do not agree with this sentiment. There is in my view nothing unique about the factual circumstances of this case. Like any other gender based violence incident, circumstances may not be identical to those of another case. That on its own does not make the circumstances, unique.

[40] Most cases involving gender based violence have the following as common denominator: a woman who falls in love hoping to be loved and protected by her man, and a man who uses his masculine strength to control and display power over the woman who fell in love with him. In *S v Tshabalala*[5], Mathopo AJ (as he then was) said,

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[4] 2001 (1) SACR 469 (SCA) at para 9.
[5] [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC) at para 1.

> "for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women."

[41] In *S v Chapman*[6], Mohamed CJ said,

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[42] There is nothing that can be regarded as substantial and compelling circumstances that presented before the court *a quo* in this case. The facts demonstrate just another man exercising his control over a woman, whose crime was to fall in love with him. The fact that she was raped just moments after she was involved in a motor vehicle accident in which the motor vehicle was written off on the spot, is aggravating as it added to the trauma she was already subjected to. What makes it worse is that the Appellant was the driver of the motor vehicle when they were involved in the accident. He should have been more considerate than he did if he cared. There is no reason to interfere with the sentence as there was no

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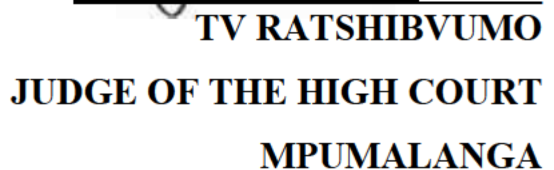
[6] [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4.

misdirection by the court *a quo* in finding no substantial and compelling circumstances, based on which it could deviate from the prescribed sentence. The appeal on sentence is also bound to fail.

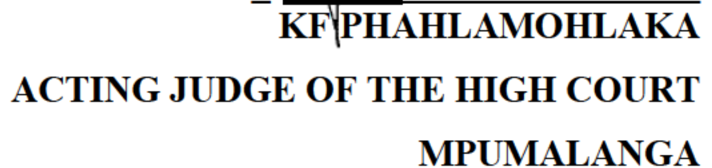
[43] Consequently, the following order is proposed:

Appeal against the conviction and the sentence is dismissed.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA

I agree. It is so ordered.



KF PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA

FOR THE APPELLANT: **MR. PJ DU PLESSIS**

INSTRUCTED BY: **BDK ATTORNEYS**

	C/O DE JAGER HATTINGH
	ATTORNEYS
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FOR THE RESPONDENT:	**ADV. R MOLOKOANE**
INSTRUCTED BY:	**OFFICE OF THE DPP**
	MIDDELBURG
JUDGMENT RESERVED:	**03 MAY 2024**
JUDGMENT DELIVERED:	**04 JUNE 2024**